COURT OF APPEALS
DECISION
DATED AND RELEASED

October 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0447

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STEPHEN MANLEY and DEBRA MANLEY,

Plaintiffs-Appellants,

v.

WISCONSIN PATIENTS COMPENSATION FUND, PHYSICIANS INSURANCE COMPANY OF WISCONSIN, DR. ROBERT J. KOONTZ, and REEDSBURG PHYSICIANS GROUP, S.C.,

Defendants-Respondents.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, and Deininger, JJ.

EICH, C.J. This is an interlocutory appeal heard pursuant to RULE 809.50, STATS. Stephen and Debra Manley appeal from an order denying their motion to amend their complaint to state an informed consent claim in a medical malpractice action against Dr. Robert J. Koontz, his insurer, Physicians Insurance Company of Wisconsin, and Reedsburg Physicians Group.

On appeal, the Manleys contend that: (1) the trial court erred in holding that a cause of action for a physician's failure to obtain informed consent must be separately pled from a cause of action for failure to diagnose and treat; (2) the trial court erroneously exercised its discretion in not allowing the Manleys to amend their complaint to include a cause of action for informed consent; and (3) justice requires us to permit the amendment. We disagree and affirm the trial court's order.

The action arises out of a stroke Stephen Manley suffered while a patient of his family doctor, Dr. Robert J. Koontz. The Manleys' original complaint alleged that Dr. Koontz's "fail[ure] to properly diagnose and treat [Mr. Manley's] health condition ... was negligent ...." A month later, the Manleys filed an amended complaint, adding Dr. Koontz's insurer as a party. On August 9, 1994, the parties agreed to a scheduling order requiring them to amend all pleadings on or before November 1, 1994,[1] and in October, the Manleys filed a second amended complaint. None of their three complaints included a claim for informed consent or any reference to the statute creating a cause of action for informed consent, § 448.30, STATS.;[2] nor was the issue of informed consent ever raised before the November deadline.

In December 1995, more than a year after the deadline for amendments had expired, the Manleys moved to amend the pleadings. At the hearing, the judge asked the Manleys' attorney why he waited until then to bring the motion instead of complying with the time frame of the scheduling order. He responded, "I don't know, Judge." The trial court, concluding that informed consent is an issue that must be separately raised in the pleadings, denied the Manleys' motion. We granted the Manleys' petition for leave to appeal to this court.

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[1] In April 1995, at the request of the Manleys' attorney, the parties stipulated to an amendment to the scheduling order, which extended the deadlines for disclosure and discovery and the date for scheduling the pretrial conference. The amended scheduling order did not change the November 1, 1994, date for amending the pleadings.

[2] Section 448.30, STATS., provides, "Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments."

The Manleys first argue that the improper diagnosis and treatment claim in their complaint encompasses a claim for informed consent. "Whether a complaint states a claim is a question of law we review without deference to the trial court." ***Badger Cab Co. v. Soule***, 171 Wis.2d 754, 760, 492 N.W.2d 375, 378 (Ct. App. 1992).

In ***Finley v. Culligan***, 201 Wis.2d 611, 548 N.W.2d 854 (Ct. App. 1996), we recognized that failure to diagnose and failure to obtain informed consent are discrete forms of malpractice, each requiring "consideration of additional and different factors." ***Id.*** at 628, 548 N.W.2d at 861. And we rejected the argument that an informed consent claim automatically "`piggybacks' an alternative method of treatment defense." ***Id.***[3] We conclude that ***Finley*** requires the Manleys' claim for informed consent to have been pled separately.

The Manleys also argue that the trial court erroneously exercised its discretion in denying their motion to amend the complaint to allege a violation of informed consent. Whether to grant or deny leave to amend a complaint lies within the trial court's discretion. ***Korkow v. General Cas. Co.***, 117 Wis.2d 187, 197, 344 N.W.2d 108, 113 (1984). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39. If, however, a discretionary decision rests upon an error of law, the decision exceeds the limits of the court's discretion. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

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[3] The history of the claim of failure to obtain informed consent shows the two causes of action are pled separately. *See* ***Martin v. Richards***, 192 Wis.2d 156, 166, 531 N.W.2d 70, 75 (1995); ***Scaria v. St. Paul Fire & Marine Ins. Co.***, 68 Wis.2d 1, 9, 20, 227 N.W.2d 647, 651, 657 (1975); ***Paulsen v. Gundersen***, 218 Wis. 578, 584, 260 N.W. 448, 451 (1935).

The Manleys point to a statement in the trial court's decision that it had "considered whether [the Manleys'] counsel had a good excuse for not following the scheduling order," and they argue that this is the equivalent of an inquiry into whether the Manleys' failure to act before the order expired was the result of "excusable neglect" under § 801.15(2), STATS.,[4] which they contend is the wrong legal standard. We disagree. The court explained the reasons underlying its decision as follows:

> In using its discretion as to whether or not to permit the late amendment to the pleading, the court must balance the interest of both parties.... As I balance those considerations, taking into account the fact that the information was known from the outset, that there is no satisfactory explanation given as to why the motion is being brought at this time and not done previously and essentially, most of the discovery has been completed ... in accordance with the earlier scheduling order, I conclude that I have, in exercising my discretion, the authority to deny [the] plaintiffs' motion to amend.

Section 802.09, STATS., the general statute on the amendment of pleadings, states that after a party's pleadings have been amended once, subsequent amendments can be made "only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires." In deciding whether to permit a second or later amendment, the court must "balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment." ***State v. Peterson***, 104 Wis.2d 616, 634, 312 N.W.2d 784, 793 (1981). The trial court's just-quoted statement satisfies us that that is exactly what it did, and it did not erroneously exercise its discretion in denying the Manleys' motion.[5]

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[4] Section 801.15(2)(a), STATS., relating to the time provisions for commencing an action, provides: "When an act is required to be done at or within a specified time ....[and] the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect."

[5] Even if we were to accept the Manleys' contention that the trial court relied, in whole

Finally, the Manleys request that we exercise our discretionary authority under § 752.35, STATS., to reverse the trial court's order on grounds that the controversy was not fully tried or, alternatively, that justice has miscarried.[6] We decline to do so. First, both the language of the statute and its history suggest that it is ill-suited as a remedy on an interlocutory appeal, such as this one, where the trial is yet to—and will—occur. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19-20, 456 N.W.2d 797, 805-06 (1990); Note, "State v. Wyss: A New Appellate Standard for Granting New Trials in the Interest of Justice," 1987 WIS. L. REV. 171 (1987).

Beyond that, we have concluded that (1) the trial court correctly ruled that the informed consent issue must be separately pled; and (2) it did not err in denying the Manleys' motion to amend their complaint. The Manleys have not persuaded us how, despite those holdings, the interest of justice nonetheless requires reversal.

By the Court.—Order affirmed.

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(..continued)
or in part, on the "excusable neglect" provisions of § 801.15(2)(a), STATS., we still see no error, for 801.15(2)(a) applies to untimely applications for relief from court-ordered deadlines. ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 367, 455 N.W.2d 250, 251 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).

[6] The statute provides in pertinent part:

> [I]f it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court [of appeals] may reverse the judgment or order appealed from ... and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial ....